In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF FOR RESPONDENT.

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STATEMENT OF FACTS AND ARGUMENT.

Mrs. Meredith and her daughter, who was a young lady, approached the grade crossing along Hardy Road in daylight, where the collision took place. Hardy Road is in the outskirts of the City of Painesville, a City of about 11,000 population. Hardy Road is very largely used for the purpose of going to a large park of many amusements, located on the shore of Lake Erie and a short distance from the crossing. An apple orchard extended along the highway on the lefthand side in the direction Mrs. Meredith was driving about eight hundred feet and about the same distance along the railroad right of way. *It was utterly impossible for people in automobiles to see the movement of a car or cars on the railroad. It was equally utterly impossible, because of the orchard, for anyone on a train to see an automobile approaching the crossing on the highway.* (See exhibits 3 and 5.) In addition to the orchard, there were a number of large trees between the orchard and the highway along the macadam road, which shortly after

the accident were removed, the stumps remaining. Along the railroad right of way the limbs of the apple trees extended over and encroached upon the right of way quite a number of feet. The measured distance from where the ladies in the automobile would have a clear view of the railroad was only seventeen feet to the danger zone of the cars moving on the railroad.

There was no signal of any kind given. There was no whistling post or never had been any, or anything else to designate where the whistle should be sounded. The train was drifting as it approached the crossing.

It was agreed between counsel that at the time of the collision or just immediately before the collision the train was moving at ten miles an hour. The tracks of the railroad itself, at the time of the accident, were not the same as at the time of trial, for a few days before the trial the railroad company had caused the tracks to be ballasted from the crossing to the place of the accident or a short distance beyond. The Packard car in which the ladies were riding was struck in the middle on the left and picked up on the tender of the locomotive engine (the car projecting beyond each side of the train) and carried six-hundred and fifty-seven feet, and for all of that distance no injury of any kind had been caused the occupants of the automobile. At six hundred and fifty-seven feet a tie projected above the other ties some inches and it caught the automobile, pulling it under the train, at which time all of the great injuries were occasioned the occupants. The train then was caused to come to a stop, not by any of the efforts of the crew but by reason of the automobile under the tender. In fact the one hundred thousand pound tender *had been raised from the rails by reason of the automobile under the wheels.*

Three members of the crew, all on the backing tender, knew of the situation immediately before the collision and

at all times thereafter. The front brakeman, John Fitzgerald, was on the running board of the tender when he first saw the automobile a short distance away. He then, in attempting to get away from the effects of the collision went up the ladder on the back of the tender, with his back towards the moving automobile. The automobile approached the crossing on the fireman's side and the fireman before there was any collision knew of the danger. He immediately notified the engineer and the engineer then applied the air brakes on the tender and the locomotive engine. There were thirty-two cars being pulled, nine of them not loaded. They had been brought from the New York Central yards where they had been brought from other states and left standing, coupled together, immediately before the accident. The thirty-two cars were all coupled together after they had been taken from the New York Central train, and left in that position until they had moved to the place of the accident. (R. p. 269.)

When Doubledee, the conductor, coupled his locomotive to the thirty-two cars he did not couple the air, although it would have required only a couple of seconds to have done so. The same locomotive engine had taken about forty cars from different places along its line to the New York Central Railroad and then the locomotive engine had been coupled to the thirty-two standing cars by the conductor. The conductor after making the coupling, together with the rear brakeman, had gone to the rear of the thirty-two cars, the conductor on one side of the cars and the rear brakeman on the other, so as to see that they were properly coupled together, and they remained at the rear of the thirty-two cars until the time of the accident. The air was not coupled. Therefore the engineer at the time of the collision at the crossing was wholly unable to use any of the brakes on the thirty-two cars. Among the thirty-two cars there were a number of loaded coal cars which had been brought

in from Virginia and Pennsylvania on a continuous trip and which were being moved by the defendant company to be delivered to their destination, which destination was beyond the Hardy Road crossing. These thirty-two cars were to be moved to the Alkali Plant, which was a short distance beyond where the accident occurred.

The defendant's railroad was about twenty miles in length and for a long number of years had been delivering loaded cars from the Baltimore & Ohio, the New York Central and from a lake port on Lake Erie. Only a small number of a total number of grade crossings was or had been at any time protected by whistling posts or places designated as the place to sound the whistle. Many of the crossings were at streets in villages and the City of Painesville. Among the crossings was Federal 20, over which the train of thirty-two cars moved before it reached the Hardy crossing which is a grade crossing on the constantly used Federal highway between Cleveland and Buffalo, which crossing was not protected by whistling posts or anything else which would indicate where the whistle should be sounded if at all and for many, many years before this particular accident interstate freight was being delivered to its destination by trains hauled by the defendant company without air being used except to operate the brakes on the locomotive engine and the tender, for it was originally the contention in the lower courts, by the railroad company, that the Safety Appliance laws—Federal or State—did not apply to its cars. There were no rules of any kind whatever furnished to members of the different crews and that was true for all of the time of the existence of the railroad.

We claim, and we believe we are amply justified by reason of the evidence, that aside from all other claims Mrs. Meredith has a right to recover in her case because of "last clear chance" or "known danger," as set out in the petition as follows:

"Third. In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge." (R. p. 15.)

The evidence shows a perfect "known danger" case. "Last clear chance" in its purity was established in the English case of *Davies v. Mann*, 10 Messon & Welsby 546. "Last clear chance" always embraces "known danger"; "Known danger" does not always embrace "last clear chance," and in Ohio we have now the "known danger" rule only.

The Supreme Court of the United States in three cases, and we believe only three, has applied in full the law of the English courts.

Coasting Co. v. Tolson, 139 U. S. 551;
RR. Co. v. Ives, 144 U. S. 408;
Chunn v. City RR. Co., 207 U. S. 302.

Of necessity, no contributory negligence could be successfully urged in a case of "known danger." Just before the trial of the instant case the Supreme Court of Ohio finally established its present doctrine and we have now, as laid down in that case, the following:

"1. 'Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him.

"4. A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; and he may recover under whichever aspect the proof in the case assumes."

Cleveland Ry. Co. v. Masterson, 126 O. S. 42.

1. It was admitted that the speed of the train, at the time of the collision, or just immediately before, was ten miles an hour.

2. It was admitted that there was no air coupled between the locomotive engine and the next car of the thirty-two cars.

3. There is no dispute but that the train moved six hundred and fifty-seven feet after the collision.

4. There is no dispute but that at least three of the crew of the trainmen, among them the engineer, knew of the great and imminent danger to the women in the automobile.

5. There is no dispute but that the Packard car was struck in the middle and picked up on the tender of the locomotive engine and in that position carried six hundred and fifty-seven feet and that neither of the ladies in the car were injured until after they arrived at the six hundred and fifty-seven feet.

6. There is no dispute but that a projecting tie at last pulled the Packard car under the tender. (See map, exhibit 8.)

7. The evidence overwhelmingly shows that there was no sand used on the rails while the engine was moving the six hundred and fifty-seven feet. No one testified that sand was used.

8. The proof overwhelmingly shows that there was no oil on the tracks or rails from the place where the Packard automobile was under the tender at the crossing where the collision occurred.

9. The evidence shows, without any contradiction, that in the exercise of ordinary care the train could have been stopped in less than three hundred feet by the use of the air brakes on the tender and the locomotive engine. (See

testimony of experts, C. L. Fisher and Josiah Jones, R. pp. 81 and 75:)

"The province of the jury is to find the facts, but the facts being found or conceded, it is the duty of the court to declare the law applicable to such facts * * *."
Railway Co. v. Liidtke, 69 O. S. 400-401.

Shauck, *J.*—

"It is subversive of the public interests and promotive of no right of either party to continue a contest before a jury when nothing is involved but the application of the law to a state of facts conclusively established."

Gas & Elec. Co. v. Archdeacon, 80 O. S. 39.

It is the law of Ohio that "A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; *and he may recover under whichever aspect the proof in the case assumes.*"—*Cleveland Ry. Co. v. Masterson*, 126 O. S. 42. (Italics ours.)

DID THE FEDERAL SAFETY APPLIANCE LAWS GOVERN?

Assume that under the Federal "hours of service" law a locomotive engineer, by lack of sleep and rest, could not properly exercise either sight or hearing and the failure to exercise sight and hearing was the proximate cause of injuries to persons in an automobile on a grade crossing. Would the injured people in the automobile receive no protection under the Federal "hours of service" law?

Assume that in the night season an automobile was struck at a grade crossing and there were no lights at all, or defective lights, used on the front of the locomotive engine. Could not the injured people in this hypothetical case receive any benefit by reason of the Federal laws in reference to the kind of headlights a locomotive should use?

Again, if the Federal Safety Appliance laws, as claimed by opposing counsel, did not apply, then the State law on the same subject—brakes—did apply and the Courts of Ohio have so held. The statutory law of Ohio on this subject, provides:

Sec. 8949, General Code of Ohio:

"No common carrier, engaged in moving traffic on a railroad, between points within this state, shall use on its line a locomotive therefor not equipped with power driving wheel brakes and appliances for operating the train-brake system, or, in such business, run a train unless at least eighty-five percentum of the cars therein shall have air brakes thereon so arranged that they can be operated and used from the engine by the engineer of the locomotive drawing such train, and unless all of such cars so equipped shall be associated together."

If the Federal laws did apply, then, because the Congress of the United States had invaded the field of brakes, the State law would not apply *and only because of the invasion by Congress.* If the subject of brakes, so far as the citizens of Ohio are concerned, did not apply, and the Federal Safety Appliance laws were silent on that subject, *then there was no invasion of that field,* and the State law instead of hibernating would be alive and in full force.

It can hardly be said that there was prejudicial error directly affecting the railroad company, in not obtaining a fair trial by saying that the Trial Judge used, in reference to the brake law, in his Charge, that they were laws of the United States; for if they applied, there was no error and if they did not apply there was no invasion of the State's rights to make such laws for the State of Ohio had enacted a brake law which had been interpreted to protect not only the railroad men and those on the train but all of its citizens, for the courts of Ohio have consistently held just opposite of what opposing counsel contends.

There was a grade crossing accident where people in an automobile were injured by being struck by a locomotive engine. The Federal Boiler Inspection Act required that a locomotive should be equipped with a headlight but the headlight was not such a one as required by the Interstate Commerce Commission. That the Interstate Commerce Commission had the power to promulgate such a rule can not be questioned. (See *Napier vs. Atlantic Coast Railroad Company*, 272 U. S. 432.) It was charged in this State case of *Pennsylvania R. R. Co. v. George R. Moses, Admr.*, that The Boiler Inspection Act did apply and the Judge charged the jury that the railroad company was guilty of negligence *per se*. *Pennsylvania Railroad Company vs. George R. Moses, Admr.*, decided October 28th, 1931, by the Fifth District Court of Appeals, found in 42 Ohio App. 220.

DOES THE PREAMBLE CONTROL?

A preamble does not necessarily limit the application of an Act, especially where the preamble if followed strictly would very greatly narrow the limits of the Act itself, much to the harm of citizens generally.

> "4. The preamble is no part of an Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous."
>
> *Railway Co. vs. Thomas*, 132 U. S. 174.

Chief Justice Fuller:

> "But as the preamble is no part of the Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the Legislature is in itself fatal to the claims set up."
>
> *Railway Co. vs. Thomas*, 132 U. S. 174, at page 188.

McCabe, *J.*:

"It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; * * *".

State of Indiana vs. Oil Company, 47 L. R. A. 632, 633.

"Both in England and this country, it was at one time a common practice to prefix to each law a preface, prologue or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted."

Sedgwick on Statutory and Constitutional Law, at p. 42.

"Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudiced, and drawn from the sanctions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the Legislature are to make laws to operate on future incidents, and not a decision or forestalling of rights accrued or vested under previous laws. Such a preamble is evidence that the facts were so represented to the Legislature, and not that they are really true."

Sedgwick on Statutory and Constitutional Law, at p. 44.

Respectfully submitted,

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